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NOV 15 2003

November 9, 2004

Via Federal Express and Certified Mail: ✓

Mr. James Reynolds  
Pipeline Compliance Registry  
Office of Pipeline Safety  
Research and Special Programs Administration  
U.S. Department of Transportation  
400 Seventh Street, S.W.  
Washington, D.C. 20590

Re: CPF No. 4-2003-1005

Dear Mr. Reynolds:

Enclosed is NGPL's Petition for Reconsideration and Request for Stay in Docket CPF No. 4-2003-1005, and exhibits (via federal express only).

We believe that certain fundamental errors have occurred. As a result, our client, NGPL felt it had no choice but to file the enclosed Petition for Reconsideration and Request for Stay.

Nonetheless, NGPL intends to continue working with the Office of Pipeline Safety and hopes that these matters can continue to be resolved on an informal basis.

Very truly yours,

*Michael Noone*

Michael Noone

*by Theresa Collier*

MN:cpb

Enc.

cc. R.M. Seeley

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DEPARTMENT OF TRANSPORTATION  
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION  
OFFICE OF PIPELINE SAFETY  
WASHINGTON, DC 20590

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Natural Gas Pipeline Company of America,	)	CPF No. 4-2003-1005
	)	
Respondent	)	
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**PETITION FOR RECONSIDERATION AND REQUEST FOR STAY**

Pursuant to 49 C.F.R. § 190.215, Respondent, Natural Gas Pipeline Company of America ("NGPL") submits this Petition for Reconsideration and Request for Stay of the Final Order and a Stay of the Compliance Order issued by the Associate Administrator for Pipeline Safety in this matter dated October 21, 2004 ("Final Order"). As grounds for this Petition for Reconsideration and Request for Stay, NGPL states as follows:<sup>1</sup>

**I. SUMMARY OF PROCEEDINGS**

Between February 25 and July 26, 2002, a representative of the Office of Pipeline Safety, Southwest Region, conducted an inspection of NGPL's natural gas onshore pipeline systems of multiple units of the Gulf Coast System in Texas and Louisiana, Oklahoma Extension System, and are located in the towns of Ratcliff City, Mooreland, Roxton, Mt. View, Lufkin, Victoria, Robstown, Wharton, New Caney, Cameron, Devers and Marshall. Ten months after these inspections, on May 14, 2003, the Southwest Region Office of Pipeline Safety issued a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order ("Notice of Violation"). Within 30 days, NGPL requested an informal hearing. After an additional five months the informal hearing was held on November 13, 2003. Eleven months after the hearing, on October 21, 2004, the OPS issued its Final Order.

**II. SUMMARY OF WHY FINAL ORDER SHOULD BE STAYED  
AND/OR RULINGS ON CONTESTED ITEMS SET ASIDE**

Two items were contested by NGPL. The first matter involved a Notice of Violation alleging that NGPL had failed to make prompt remedial action to remediate low pipe to soil ratio readings on its Love County lateral without making finding regarding "promptness," the Office

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<sup>1</sup> NGPL understands that the filing of this Petition automatically stays the payment of any civil penalties assessed. NGPL is concurrently herewith seeking a stay of the Compliance Order pending the outcome of the Petition for Reconsideration and any subsequent appeals.

of Pipeline Safety ("OPS"), however, has fined NGPL based on an alleged violation not described in the original notice of violation and not the subject of any amended notice. Such procedure directly contravenes the Agency's own regulations and NGPL's right to procedural due process under the United States Constitution. Moreover, if NGPL had been provided with proper notice of the alleged violation, NGPL could have offered evidence demonstrating that no violation had occurred.

The second matter involves the question of what constitutes a "highway" for purposes of 49 C.F.R. § 192.705(a). Without rulemaking or notice by the agency, the OPS has deviated from its historical practices in administering this regulation and purports to impose an unlimited duty to patrol all public ways, including all unimproved roads. The "authorities" offered by the OPS do not support the position asserted in the Final Order. If the agency now proposes to adopt such an expansive interpretation, notice of proposed rulemaking and compliance with the applicable procedural regulations are required. Moreover, the Final Order does not define "highway" sufficiently for NGPL to abide by the Compliance Order. Instead, NGPL is still subject to the agency's undefined interpretation of "highway" for purposes of 49 C.F.R. § 192.705(a).

The detailed reasons as to why the Petition for Reconsideration should be granted follow.

### **III. ITEM 2 OF THE FINAL ORDER SHOULD BE SET ASIDE**

#### **A. ITEM 2 OF THE FINAL ORDER**

NGPL petitions for reconsideration with regard to Item 2 of the Final Order on two grounds. First, the Final Order violates 49 C.F.R. § 190.207, Notice of Probable Violation, because the Associate Administrator for Pipeline Safety has apparently based its finding of a violation of 49 C.F.R. § 192.465(d) on matters that were never described in the Notice of Violation or raised at the hearing. Second, it appears that the OPS has ignored un rebutted testimony and documentation that NGPL fully complied with 49 C.F.R. § 192.465(d) by taking "prompt remedial action" to correct deficiencies it found and recorded in its monitoring of the Love County Lateral.

#### **1. The Subject Matter of the Violation Was Not Described in the Notice of Violation**

Item 2 of the Notice of Violation (dated May 14, 2003) alleged that NGPL's corrosion control records for the Love County Lateral "indicated that pipe-to-soil potentials had been low for multiple years with no documented remedial action." Notice of Violation at 3. Eight mile marker locations (test lead locations) with readings for 1999 and 2000 were set forth in the Notice. *Id.* It is important to understand that, the eight mile marker locations represent the entirety of the Love County Lateral. The Notice stated that the "review also indicated that pipe-to-soil potentials for 2001 and 2002 were at criteria levels." *Id.* The Final Order states there was a violation because NGPL's records "did not demonstrate that the entire lateral was surveyed before the next inspection cycle." Final Order at 3. The Notice of Violation, however, did not encompass an alleged "surveying" violation. NGPL has inspection records for all points prior to

the next inspection cycle. Copies of these records were provided during the informal hearing and are being included herewith again.

The issue of surveying the entire lateral was not part of the Notice of Violation or hearing. NGPL was not given the opportunity to present evidence on the point. OPS is required to provide an amended Notice of Violation and provide NGPL with an opportunity to respond before entry of the Final Order. *See* 49 C.F.R. § 190.207(c).

**2. OPS ignored uncontroverted evidence demonstrating prompt remedial action.<sup>2</sup>**

The Notice of Violation and the hearing concerned the alleged violation of 49 C.F.R. § 192.465(d), and listed the readings that were the subject of the Notice and hearing. Section 192.465(d) requires an operator to “take prompt remedial action to correct any deficiencies indicated by the monitoring.” In order to find a violation then, the OPS must find as a factual matter that NGPL failed to take “prompt” remedial action as to the deficiencies it listed. There is no finding in the Final Order regarding the promptness of NGPL’s response. It remains uncontroverted that NGPL took “prompt” remedial action under any reasonable understanding of the term.<sup>3</sup> Below is the chronology of events that was presented at the hearing and submitted after the hearing. None of these actions were challenged or otherwise disputed by OPS. Each item on the chronology is supported by a document or testimony at the hearing.

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<sup>2</sup> NGPL understood that the informal nature of the hearings meant that the OPS preferred that the proceeding be conducted without a stenographer to take testimony of witnesses and reliance on exhibits not “formally” introduced into evidence. NGPL understood, nonetheless, that at the end of the day, the agency would make reasonable findings with regard to what was un rebutted testimony and documentation presented at the “informal hearing.” For example, rather than, as the OPS states, simply “submitting color photographs of the locations identified in the notice,” Respondent’s submitted pictures and testimony that demonstrated that under no reasonable interpretation of the regulations, could these roads be called “highways.” The OPS does not address for example whether it is its final position that a road like Bill Barret is a highway under 49 C.F.R. § 192.705(a). NGPL is attaching to this Petition all records that it presented at the hearing as well as affidavits.

<sup>3</sup> In the Matter of Conoco Pipe Line Company, CPF No. 46506, Final Order, dated September 5, 2001, the OPS considered the question of prompt remedial action in the context of remediating “low cathodic protection readings.” The OPS concluded that the respondent had not acted within a “reasonable period” by waiting “two or three cycles of low readings to begin.” OPS concluded that the “Respondent should have implemented the actions before the next inspection cycle ...” This is precisely what NGPL did, and so, NGPL acted “promptly” in accord with OPS precedent. *See also*, 68 FR 53895 at 53898-99, RSPA Final Rule commentary in which RSPA rejects the recommendation to use the term “immediate remedial action” in connection with valve maintenance, and instead used the term “prompt remedial action” so as to “allow operators some latitude in scheduling maintenance” and so as not to “erode the latitude operators need in scheduling repairs.”

**CHRONOLOGY OF EVENTS RELATED TO  
LOVE COUNTY LATERAL LOW PIPE TO  
SOILS RATIO TESTING AND REMEDIATION  
(ITEM 2)**

<b>DATE</b>	<b>EVENT</b>
6/19/99	Love County Lateral Annual Soil Survey indicating low pipe to soil ratios
7/16/99	Continuing investigation and assessment non-compliance issue and order new rectifier
8/24/99	NGPL installs new, larger rectifier to attempt to raise Love County pipe to soil ratios
8/26/99 to 2/23/00	NGPL performs engineering/design work for deep ground bed
2/23/00	AFE request for new ground beds is submitted
3/6/00	Preliminary AFE Approval
3/09/00	AFE Approval
4/7/00	Love County ground bed permit approved
4/20/00	Bid packages sent to Vendors
5/1/00	Bids received from Vendors
5/3/00	Contract signed on 5-03-2000, with a start dated of 5-08-2000
6/16/00	NGPL performs Love County Lateral 2000 Annual Survey
7/10/00	Ground bed LCL – 10 Installation commenced
7/12/00	LCL – 10 ground bed installation completed, energized and placed in service
7/12/00	NGPL spot checks pipe to soils on 7-12-2000; all are in compliance
8/15/00	NGPL spot checks 5 pipe to soil ratios; all are in compliance
5/18/01	NGPL 2001 Annual Survey; from that day (including that day) to present; all readings are in compliance.

As the record and the above chart reveals, NGPL took prompt remedial action and continued in its endeavor until the remediation efforts were complete and successful in all

respects. In addition, the record indicates that NGPL surveyed the Love County Lateral beyond that required by the applicable regulations, even during the ongoing and prompt remediation. NGPL checked the mile marker locations on July 12, 2000 and August 15, 2000 and confirmed that the entire remediation was successful along the Love County Lateral. The next year's survey results simply confirmed this again.

The statement that "documentation submitted by the Respondent at the hearing showed completion of remedial action only at one location" is simply incorrect. NGPL refers the OPS to exhibit I,6, which was submitted and fully explained at the hearing. This exhibit establishes that all readings along the lateral at each of the mile marker listings (that represent the entirety of the Love County Lateral), and that were the subject of the Notice of Violation, demonstrated compliance, and success of the remedial action taken on the lateral.

Instead of issuing findings, the Associate Administrator refers to unrebutted evidence presented at the hearing as "contentions" or "statements" and suggesting only that "Respondent countered that." Missing from the Final Order is any recognition that the materials provided at the hearing were unrebutted with regard to the "prompt remedial action" taken.

#### **IV. ITEM 3 OF THE FINAL ORDER SHOULD BE SET ASIDE**

With regard to Item 3, NGPL petitions for reconsideration on two grounds. First, the OPS engages in inappropriate rule making and expands and/or changes its policy or interpretation with regard to the meaning of the word "highway(s)." The Final Order suggests that OPS may consider all roads, paved or unpaved to be a "highway(s)." Moreover, OPS does not define the term in the Final Order or provides useful guidance. Second, OPS has apparently ignored unrebutted evidence at the hearing that a prudent person familiar with the pipeline industry and safety purposes of the standard could have believed that an unpaved road such as Bill Barrett Road would be a "highway" under 49 C.F.R. § 192.705. Instead of considering the evidence or providing notice of an abrupt expansion of the interpretation of the term "highway(s)," OPS has relied on a state law case published in 1948.

##### **A. Inclusion of the words "county roads" in the regulations amounts to an expansion of agency policy or rulemaking without abiding by OPS' own procedures**

The Notice of Violation concerned 49 C.F.R. § 705(a). The "Proposed Compliance Order" set forth the requirement that NGPL perform a survey "to evaluate that highways are being patrolled as required by § 192.705, *including county roads.*" (emphasis added) It is undisputed that § 192.705 does not include the term "county roads." It is also undisputed that § 192.705 does not define "highway." In addition, it is undisputed that the term "county road" appears only once in all of Title 49 of the Code of Federal Regulations, at § 222.37 ("Who may establish a quiet zone?"). Section 222.37 provides for the establishment of "quiet zones," where locomotive horns will not be used at certain railroad crossings. Further, even in that regulation, "county road" and "state highway" are distinguished. *See* 49 C.F.R. § 222.37(a). Finally, it is undisputed that NGPL patrols all the crossings cited in the Notice of Violation at least once a year. What is disputed is whether some of those crossings should also be patrolled twice a year.

## 1. The Plain Meaning of "Highway"

In these circumstances the proper way to evaluate a statute or regulation is to employ the plain meaning of the words. According to Webster's, a highway is a "a public way; *especially* : a main direct road." NGPL stated at the hearing that if the OPS lawfully made a new regulation or expanded its scope and policy (in accord with the requirements of notice, comment, and so forth), NGPL would, of course, comply prospectively with any new definition of the term "highway."

## 2. OPS' Interpretation of "Highway" Departs from its Historical Policies and Practices

On page 5 of the Final Order, the Associate Administrator for Pipeline Safety states that "pre-enforcement efforts such as advisory bulletins, agency interpretations and 49 C.F.R. § 190.11 provide notice and enable Respondent to identify with ascertainable certainty the standards with which the OPS expects parties to conform." Absent from the Order is any citation to any such bulletins, interpretations and so forth that ever would have provided NGPL notice in this case to the fact that the agency interpreted highways to mean roads such as Bill Barrett Road.<sup>4</sup> It is not Respondent's burden to cite precedent where OPS excluded county roads from the definition of highway for purposes of enforcing the patrolling requirements. As a matter of due process, it is OPS's burden to demonstrate that NGPL had notice of such an interpretation before finding a violation and levying fines. The OPS cannot point to any document in which previously "county roads" had been included in the definition of highway for purposes of enforcing patrolling requirements set forth in 49 C.F.R. § 192.705.

The OPS's citation now to a case that was decided in Virginia in 1948 as somehow reasonable "fair notice" of the agency's interpretation is perplexing, and reflects the fact that the OPS cannot come up with a single document to support its position that "highways" have always meant something like county roads, or dirt trails. The case is a negligence case and involves the interpretation of the Virginia Motor Vehicle Code as it existed in 1944, with regard to the duties of a pedestrian walking down a road at night. The case was decided prior to the regulation at question, does not discuss the regulation in question. Most importantly, the Virginia statute, in direct contrast to the situation here, itself expressly defined the term "highway." The Virginia court had no problem interpreting the word "highway" in that case, since in that case the term was clearly defined in the statute. The final order neglects to mention this fact that causes the case to simply have no bearing on the issue in this matter.

In contrast, NGPL submitted at the hearing citations to DOT regulations concerning both gas and liquids pipelines that have consistently drawn a distinction between a "highway" and a "street" See e.g., 49 C.F.R. § 195.55, 191.23. Indeed NGPL submitted the commentary for the final rule "Reporting Unsafe Conditions on Gas and Hazardous Liquids Pipelines and Liquefied Natural Gas Facilities" Docket No. PS-96, 53 FR 24942, at 24946. In the section entitled "Reporting Limitations," and in response to a suggestion to change the term "public road" to "highway," RSPA itself stated that it "believes that the word 'highway' is too limiting to

<sup>4</sup> In accord with 49 C.F.R. § 190.211(e), NGPL asked for all "materials in the case file pertinent to the issues to be determined ..." No materials related to the OPS determination of "highway" have been provided and no materials related to the OPS' assessment of the penalty have been provided.

distinguish those roads where pipelines pose a greater risk to public safety.” In the end, for that rule RSPA recognized the need to include more than the word “highway” so as not to limit the regulations and adopted the terms “paved road, street or highway.” In fact they even added the word “active” before these terms to make the point clearer. No such language appears in 49 C.F.R. § 192.705. It is important to note that even in that situation the term “county road” does not appear.

NGPL has never been provided with a document that indicates that OPS intended to use the *Crouse* definition, or any other heretofore-unknown definition of the word “highway” when enforcing 49 C.F.R. § 192.705.

**B. OPS did not consider uncontroverted evidence that “highways” had been patrolled and that the crossings NGPL was cited for are not “highways”**

The failure to make a formal record of the hearing has apparently prejudiced NGPL, and lead to the statements that somehow NGPL took the position that it is “not responsible for personnel providing incorrect forms that lead to the OPS inspector to request that the patrol records that lead to the notice.” NGPL did not, and does not, take such a position. Rather, at the hearing, NGPL simply identified and explained why there were indications in its documents that the requirements for twice a year patrolling was “not applicable ” for certain crossings, and explained that highways were being patrolled in accord with the regulations.

NGPL submitted pictures of highway crossings that were the subject of the Notice of Violation that under any reasonable definition could not be called highways. The OPS’s use of a 1948 state law case from Virginia, a case which was decided prior to the regulation in question, is inappropriate and represents the first time that the agency has stated that this is somehow its definition of “highway” for purposes of this subsection.

**V. REGARDLESS OF THE AGENCY’S FINDINGS AS TO THE VIOLATIONS, THE OPS DID NOT PROPERLY WEIGH THE REQUIRED ASSESSMENT CONSIDERATIONS WHEN IT ASSESSED THE PENALTIES**

In light of the above, NGPL believes that the agency has not properly weighed the considerations for assessment of fines as set forth in 49 C.F.R. §190.225. These factors are:

1. nature, circumstances and gravity of violation;
2. the degree of culpability and good faith of respondent;
3. the respondent’s history of prior offenses;
4. the respondent’s ability to pay;
5. any good faith by the respondent to attempt to achieve compliance;
6. the effect on the respondent’s ability to continue in business; and



7. such other matters as justice may require.

While the Final Order discusses these factors, the OPS did not properly consider all of them. With regarding to Item 2, the "prompt remediation" violation, the documentation proves prompt action. This was never a situation where safety was an issue. NGPL repeats what it stated at the hearing, the OPS Inspector was fully apprised of the situation at the time of the inspection and the inspector did not ask for documentation that established the prompt remediation.

With regard to Item 3, the "highway" issue, there is no violation. The nature and circumstances are such that crossings at issue are patrolled once a year. There was no danger. If one is willing to overlook that, NGPL has been unable to locate any prior citation for such an infraction. NGPL's actions were taken in good faith based on the plain meaning, and historically understood meaning, of the term highway. Since there was not fair notice of the expanded term "highway" both the finding of a violation and a fine are not proper.

## VI. REQUEST FOR STAY OF COMPLIANCE ORDER

Because of the lack of guidance, it is unreasonable to require NGPL to comply with the compliance order. As set forth above, the *Crouse* case is inapposite to this case and does not provide guidance. Even still, while the OPS cites to *Crouse v. Pugh*, the OPS does not officially adopt the definition of *Pugh* in its Order. One interpretation of the order could lead one to conclude that the agency's ruling in this Final Order would require NGPL to inspect every single road of "whatever nature" in the region. With regard to the Compliance Order, the agency has still not provided NGPL a definitive explanation or definition for what a highway is, and therefore has left NGPL without clear guidance as to what roads must be patrolled on a semiannual basis. The Compliance Order itself indicates that "highways, including county roads" need to be patrolled. Yet, there is no clear definition that is officially adopted of either a highway or county road in the Final Order. NGPL is being required to amend its procedures (O&M 215) so that instruction is given to the operations personnel on which roads to inspect and when. NGPL has inspected "hard surfaced" roads as these encompassed State and Federally numbered roads (i.e. Highways). The requirement that a survey be performed to insure compliance is an unreasonable request given the amount of time (30 days) to comply. NGPL has 8093 miles of pipeline as reported on our 2003 Annual Report which could easily be thousands of road crossings that would have to be patrolled on short notice. It is not practical to schedule this within 30 days. This request is financially and practically unreasonable. As a result, NGPL cannot comply with the Compliance Order within the time limit ordered, and NGPL seeks a stay of the order until the OPS can provide a clear definition that it has adopted for purposes of 49 C.F.R. § 192.705.

## VI. CONCLUSION

NGPL is a prudent operator, and is diligent in its application of its O&M procedures to insure compliance with all applicable regulations, and to insure the integrity of its gas pipeline, and the safety of its employees and the public at large. NGPL took immediate, good faith, steps to remedy the low readings and, promptly remedied the situation, all in compliance with the

regulations. For all the foregoing reasons, NGPL requests OPS to grant the Petition for Reconsideration and set aside its Final Order and assessment of penalties in this matter.

Submitted this 9th day of November 2004.

By Michael Noone  
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